UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of: **EXELA ENTERPRISE SOLUTIONS, INC.** **Employer,** **and** **UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC,** **Petitioner.**	**Case No. 22-RC-237040**

EMPLOYER'S REQUEST FOR REVIEW

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Pursuant to Section 102.67 of the Rules and Regulations of the National Labor Relations Board (the "Board"), the Employer, Exela Enterprise Solutions, Inc. (the "Employer"), by and through its undersigned counsel, hereby files this Request for Review of the Regional Director of Region 22's August 13, 2020 Decision and Certification of Representative ("Decision").[1] As discussed below, the Regional Director incorrectly affirmed the Hearing Officer's Report which overruled the Employer's Objections to the March 29, 2019 election.

As to Objection 1, the Regional Director incorrectly determined that the Union's shop steward for another on-site employer, Fred Johnson, was not the Union's agent for purposes of assessing objectionable conduct. The Regional Director erred in concluding that only the two Union organizers assigned to the Employer's organizing campaign qualified as Union agents for these purposes. In fact, the evidence demonstrates that Mr. Johnson had both actual and apparent authority to act on the Union's behalf.

The Regional Director also erred by adopting the Hearing Officer's findings that the interactions between Mr. Johnson and eligible voters on election day did not qualify as objectionable conduct. This case is unique because, unlike the third-party Union organizers, Mr. Johnson had much greater access to the eligible voters because of his role working with another on-site employer. The Regional Director failed to give proper weight to the undisputed fact that Mr. Johnson was inexplicably "huddling" with a group of eligible voters, all of whom were on working time, less than one hour prior to when the election commenced. The Regional Director and the Hearing Officer improperly placed the burden on the Employer to affirmatively demonstrate that the topic of the Union agent's discussions with the eligible voters concerned the

[1] On August 20, 2020, the Executive Secretary granted the Employer's request for an extension to submit its Request for review of the Decision until September 10, 2020.

imminent election. However, had the Employer tried to glean that information, it could have been accused of surveillance.

As to Objection 2, the Regional Director failed to correct the Hearing Officer's disregard that the Union's representatives failed to adhere to the Board agent's instructions to promptly vacate the polling place. Rather, the evidence demonstrates the Union's representatives languished in the adjacent parking lot, potentially visible to voters, without any justification.

Accordingly, the Employer respectfully requests that the Board grant the Employer's Request for Review and direct a second election based upon the Union's objectionable conduct which destroyed laboratory conditions for a free election.

I. STATEMENT OF THE CASE

On March 1, 2019, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("Union") filed a petition for an election at the Employer's 1 Squibb Drive, New Brunswick, New Jersey site. On March 18, 2019, the parties signed a Stipulated Election Agreement, agreeing to the following voting unit:

> **Included:** All Full-time and Regular Part-Time Customer Service Associates, including Customer Service Associates – Coffee Associates, Customer Service Technical Specialist, Team Leads, Forklift Operators, CSA TS Client Services, TL Tech Serv. And Shipping and Receiving Hazmat Associates, employed by the Employer at its 1 Squibb Drive, New Brunswick, New Jersey facility.
>
> **Excluded:** All Office Clerical employees, Professional employees, Guard and Supervisors as defined in the Act, and all other employees.

The election was conducted on March 29, 2019, with the following results: eight votes for the Petitioner, six votes against the Petitioner, and zero ballots challenged. On April 5, 2019, the Employer timely filed Objections to the Conduct of the Election and to Conduct Affecting the Results of the Election ("Objections").

These Objections stated as follows:

1. Within the twenty-four hour period immediately preceding the opening of the polls in the subject election, the Union, through its agents, visited groups of voters on working time at the Employer's job site and engaged in pro-union electioneering meetings and talks, in contravention of the rule established by Peerless Plywood Co., 107 NLRB 427 (1954), and its progeny.

2. The Union, through its agents, engaged in objectionable conduct by improperly electioneering near the entrance to the polling site during the March 29, 2019 election.[2]

On April 19, 2019, the Acting Regional Director issued an Order Directing Hearing and Notice of Hearing on Objections. On April 24, 2019, a hearing was held before Hearing Officer Eric Pomianowski. Three witnesses testified on the Employer's behalf: Wanda Rodriguez, Jo Ann Lee, and Karen Brewer. Two witnesses testified for the Union: Brian Callow and Clifford Gray. On June 29, 2019, the Hearing Officer issued his Report, overruling both of the Employer's Objections. On August 13, 2020, the Regional Director issued the Decision and Certification of Representative.

II. BACKGROUND

The Employer contracts with Jones Lang LaSalle ("JLL") to provide office-based services and facilities management at Bristol-Myers Squibb's ("BMS") office located at 1 Squibb Drive in New Brunswick, New Jersey. (Tr. 12-13). The work area consists of a shipping and

[2] The Hearing Officer's Report ("Report") adds the phrase "in violation of the rule established by *Milchem, Inc.*, 170 NLRB 362 (1968)." (Report, at 1). To the extent this addition served to narrow the scope of the Employer's Objection 2, the Hearing Officer erred and the Regional Director failed to correct that error.

receiving warehouse. (Tr. 32). Ms. Lee is the Employer's Service Delivery Manager III who has oversight over the New Brunswick location. (Tr. 29-30).

III. FACTS PERTINENT TO OBJECTION 1

Mr. Johnson works for JLL and is the Union's shop steward for a unit of JLL employees working at the same BMS site as the Exela employees at issue in this case. (Tr. 108).[3] On the morning of March 29, 2019, less than an hour before the polls were set to open, Ms. Rodriguez, an eligible voter, observed Mr. Johnson, a non-Exela employee, "huddled up" with a group of eligible voters in their working area. (Tr. 20). These employees had already commenced their shifts and were not on a break. (Tr. 20). Although Mr. Johnson would come to the unit employees' working area to search for packages, when he did so, he would only speak to one employee, not multiple employees. (Tr. 21).

Shortly thereafter, Ms. Rodriguez approached Ms. Lee in her office, which is adjacent to the shipping and receiving area, to ask if the Union's representative (Mr. Johnson) was supposed to be huddling with the staff. (Tr. 32). Ms. Lee replied that he was not supposed to be there and walked out of her office to investigate. (Tr. 33). Ms. Lee observed three Exela employees (including Clifford Gray), and two men who she did not recognize standing nearby. (Tr. 33, 45-46). She asked one of the men (who Ms. Lee identified as Fred Johnson) if she could provide him with any assistance. (Tr. 33-35). Mr. Johnson replied that he was looking for a package, but, soon thereafter, he left the area without a package and without further interaction with the staff. (Tr. 33); (Er. Ex. 2).[4]

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[3] It is noteworthy that the Union's representative at the hearing acknowledged that Mr. Johnson was the local Union's president, which is also indicative of agency status. (Tr. 19).

[4] At 9:15 a.m., Ms. Lee e-mailed herself to memorialize her observations and interactions with the group, including Mr. Johnson. (Er. Ex. 2). At 9:18 a.m., Ms. Rodriguez e-mailed Ms. Lee to memorialize her observations. (Er. Ex. 1).

Based upon an arrangement made the day prior, Mr. Johnson drove Mr. Gray to the polling site at the Rutgers Labor Education Center on March 29, 2019.[5]

IV. THE REGIONAL DIRECTOR'S AND HEARING OFFICER'S FINDINGS CONCERNING OBJECTION 1

The Hearing Officer overruled the Employer's Objection 1, finding the facts did not fall within the proscription of the rule set forth in Peerless Plywood Co., 107 NLRB 427 (1954). In doing so, and without drawing an adverse inference for Mr. Johnson's failure to testify, the Hearing Officer found: (1) Mr. Johnson's interaction was a chance meeting, not a massed meeting or mandatory speech; (2) Mr. Johnson is often in the Employer's work area to pick up packages; and (3) none of the Employer's witnesses heard what Mr. Johnson was saying to the assembly of employees less than an hour before the election commenced. (Report, at 4). According to the Hearing Officer, the Employer failed to satisfy its burden to establish that Mr. Johnson's discussion with eligible voters concerned the election. (Report, at 5).

Even though the Hearing Officer failed to decide the issue, the Regional Director concluded Mr. Johnson was not a Union agent, primarily because he was a shop steward for another employer's employees, not a shop steward for the petitioned-for bargaining unit. (Regional Director's Decision ("Decision"), at 3). The Regional Director also found that the mere status of being a shop steward does not automatically confer agency status. (Decision, at 3). The Regional Director rejected the Employer's arguments that Mr. Johnson had actual and apparent authority, finding instead that there was no evidence the Union authorized him to act on its behalf and that an employee's knowledge of Mr. Johnson's status as a Union representative observed huddling

[5] Notably, Mr. Gray was unnecessarily evasive when asked on cross-examination about his relationship with Mr. Johnson. (Tr. 104-105). Additionally, Mr. Gray tried to provide elusive answers to questions about whether Mr. Johnson was affiliated with the Union, requiring the Employer's counsel to request intervention from the Hearing Officer to direct the witness to answer the question. (Tr. 108).

with eligible voters on election day was insufficient to establish agency status. (Decision, at 5-6). In doing so, the Regional Director found Ms. Rodriguez's testimony to be speculative about Mr. Johnson's role with the Union. (Decision, at 7-8). Instead, the Regional Director credited Mr. Gray who testified that only the two third-party Union organizers, and not Mr. Johnson, were involved in the organizing campaign. (Decision, at 8).

Next, the Regional Director found that, putting aside the agency status question, Mr. Johnson did not engage in objectionable conduct. Rather, the Regional Director ruled Mr. Johnson's interactions with the eligible voters on the day of the election did not qualify as a massed meeting or mandatory speech in contravention of Peerless Plywood because Mr. Johnson had no power to require eligible voters to attend a meeting. (Decision, at 9-10). Instead, the Regional Director agreed with the Hearing Officer's recommendation that the incident was nothing more than a "chance encounter" between Mr. Johnson and the eligible voters. (Decision, at 10-11). In essence, the Regional Director found nothing suspicious about Mr. Johnson huddling with employees on the day of the election even though Mr. Johnson's stated mission was to pick up a package which he never picked up, and despite the fact that, according to Ms. Rodriguez's uncontroverted testimony, his prior practice was to speak with employees individually when he was looking for a package. (Tr. 21).

The Regional Director also rejected the Employer's argument that, given the unique circumstances surrounding the incident, the appropriate standard to apply concerning whether the Union engaged in objectionable conduct was a hybrid of Peerless Plywood and Milchem, Inc., 170 NLRB 362 (1968), the latter of which governs electioneering on the election day "regardless of the content of the remarks exchanged." (Decision, at 14-15). Finally, the Regional Director found

that the Hearing Officer did not err by failing to draw an adverse inference against the Union for its failure to call Mr. Johnson. (Decision, 16-17).

V. ARGUMENT – OBJECTION #1 SHOULD BE SUSTAINED

This case involves the atypical scenario where a *Union's* agent had unfettered access to eligible voters during working time and in their work areas less than an hour before the election started. The Regional Director and Hearing Officer failed to properly consider the context in which this episode transpired and how Mr. Johnson's conduct destroyed laboratory conditions.

A. The Board's Laboratory Conditions Framework

"At all times, the Board's paramount concern has been, and still is, assuring employees full and complete choice in selecting a bargaining representative." See Kalin Construction Co., 321 NLRB 649, 651 (1996). One of the hallmark cases in this area is General Shoe Corp., 77 NLRB 124, 127 (1948) where the Board held:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

After General Shoe Corp., the Board has expounded upon this "laboratory conditions" standard in various ways. For example, in the seminal Peerless Plywood case, the Board explained its view concerning last-minute speeches to groups of employees:

> It is our considered view, based on experience with conducting representation elections, that last-minute speeches by either employers or unions delivered to massed assemblies of employees on company time have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect. We believe that the real vice is in the last-minute character of the speech coupled with the fact that it is made on company time whether delivered by the employer or the union or both. Such a speech, because of its timing, tends to create a mass psychology which overrides arguments

> made through other campaign media and gives an unfair advantage to the party, whether employer or union, who in this manner obtains the last most telling word.

Id. at 429.

Notably, the Board has held that the term "massed assemblies," as referenced in Peerless Plywood, is not "necessarily limited to all or most of the unit employees, or to any certain proportion of them, or to an assemblage of such employees whose votes would affect the outcome of the election." The Great Atlantic & Pacific Tea Company, 111 NLRB 623, 626 (1955).

Further, conspicuously absent from the Board's holding in Peerless Plywood is any suggestion that the actual content of the discussion is relevant for purposes of determining whether objectionable conduct transpired. Notably, in Flurocarbon Co., 168 NLRB 629, 656 (1967), the Board affirmed a Trial Examiner's decision which found that the content of a particular speech was not a dispositive factor in the Peerless Plywood analysis. Specifically, the Trial Examiner explained "[w]ithin the Board's view, the combined circumstance of (1) the use of company time for preelection speeches, and (2) the delivery of such speeches on the eve of the election, **regardless of their noncoercive content**, tends to destroy freedom of choice, and serves to establish an atmosphere within which a free election cannot be held." Id. (Emphasis added).

In a slightly different "laboratory conditions" context, in Milchem, Inc., 170 NLRB 362 (1968), the Board established a bright-line rule prohibiting parties from engaging in "prolonged conversations between representatives of any party to the election and voters waiting to cast ballots…." The Board's concern was "the potential for distraction, last minute electioneering or pressure, and unfair advantage" and stressed that the "final minutes before an employee casts his vote should be his own, as free from interference as possible." Id. Of particular importance here, the Board applies the Milchem rule "without inquiry into the nature of the conversations." Id. Critically, "[i]mplicit in the Peerless Plywood and Milchem rules is the Board's

judgment that conduct that is otherwise unobjectionable can disturb laboratory conditions if it occurs during, or immediately before, the election." Kalin Construction, 321 NLRB at 651. So, contrary to the Regional Director's view that the Employer conflated the concepts illustrated by Peerless Plywood and Milchem, the Board should in fact view these two doctrines in tandem.

It is against this backdrop that the Regional Director's Decision should be assessed.

B. The Regional Director Erred In Finding Mr. Johnson Was Not A Union Agent And Did Not Engage In Objectionable Conduct

In the present case, the evidence demonstrates that Mr. Johnson was a Union agent and that he engaged in objectionable conduct.

1. Mr. Johnson Was The Union's Agent

Although the Hearing Officer "determined through witness testimony that Mr. Johnson was a United Steelworkers shop steward for an existing unit of JLL employees…," he did not make a specific determination concerning whether Mr. Johnson was a Union agent. (Report, at 4). The Regional Director recognized this omission, but noted that "[t]here is no evidence in the record that Johnson's status as a JLL shop steward established a relationship between him and the Exela bargaining unit in which he was authorized to act on the Union's behalf." (Decision, at 4).[6] The Regional Director also found that there were only two Union agents assigned to the Exela campaign. However, that conclusion is flawed because it presumes that, in these circumstances,

[6] The Regional Director cited to Narragansett Restaurant Corp., 243 NLRB 125, 128 (1979) for the proposition that "[s]erving as a shop steward does not automatically confer agency." (Decision, at 3-4). The Regional Director did not cite authority suggesting that a shop steward cannot confer agency status. Moreover, it is noteworthy that in Narragansett, the Board affirmed the ALJ's decision that the shop steward in question was in fact the union's agent. Here, the Union's representative at the hearing acknowledged Mr. Johnson was the local Union's president, which also serves to enhance his agency status. (Tr. 19).

only organizers employed by the Union could qualify as Union agents and ignores common law agency principles the Board customarily relies upon.

In assessing whether a particular individual is a party's agent, the Board has held:

> …[A]ctual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied. Apparent authority, on the other hand, results from a manifestation by a principal to a third party that another is his agent. Under this concept, an individual will be held responsible for actions of his agent when he knows or 'should know' that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him. Restatement 2d, Agency, § 27.

See e.g. Communications Workers Local 9431 (Pacific Bell), 304 NLRB 446, n. 4 (1991).

In the present case, contrary to the Regional Director's findings, the evidence does in fact demonstrate Mr. Johnson had both actual and apparent authority to represent the Union. With respect to actual authority, "[t]he Board has placed probative value on an alleged agent's position as steward, finding that a steward is 'the first union representative the members look to, and the man from whom they take their cues insofar as union policy is concerned.'" Tyson Fresh Meats, 343 NLRB 1335, 1337 (2004) (internal citations omitted). In the present case, despite his initial evasiveness, and upon being instructed by the Hearing Officer to answer the question, Mr. Gray finally admitted that Mr. Johnson was a Union shop steward. (Tr. 108).

The Regional Director found Tyson Fresh Meats to be distinguishable from the present case because that case involved shop stewards who, inter alia, conducted new hire orientation and processed grievances. (Decision, at 4-5). By contrast, according to the Regional Director, because Mr. Johnson was a shop steward for another employer, albeit one sharing the same premises as the Employer, he could not have been vested with actual authority to act on behalf of the Union. However, there is nothing in Tyson Fresh Meats to suggest that its teachings

are limited to its particular facts and that a shop steward can never be a union's agent in connection with dealings with another employer's employees who work at the same site.

The Regional Director also found that Mr. Johnson "had no prior interaction with Exela management on behalf of the bargaining unit, and there was no evidence that he was authorized by the Union to act as its agent for the purpose of organizing the Exela bargaining unit." (Decision, at 5). However, Tyson Fresh Meats does not require that a particular Union agent have any interactions with the representative of an employer it is seeking to organize. In addition, there would be no reason for the proposed bargaining unit to elect a shop steward before an election and before results were certified. Moreover, as discussed below, an adverse inference should be drawn for the Union's failure to call Mr. Johnson to demonstrate he had no role in trying to organize the Exela bargaining unit. Mr. Johnson's huddle with eligible voters on election day sheds doubt on the Regional Director's unequivocal conclusion in this regard. Accordingly, the Board should reverse the Regional Director's finding and conclude Mr. Johnson had actual authority to act on behalf of the Union.

With respect to apparent authority, the evidence "established that the Union created a perception among employees that the steward[] represented it" when speaking to employees less than an hour before the polls opened. Tyson Fresh Foods, 343 NLRB at 1337. In this regard, Ms. Rodriguez testified that she went to speak with her supervisor, Ms. Lee, to inquire whether the Union's representative was supposed to be huddling with eligible voters. (Tr. 21; Er. Ex. 1). Ms. Rodriguez also indicated she memorialized her observations of Mr. Johnson's interactions with the eligible voters specifically because she knew Mr. Johnson was a Union representative. (Tr. 17; Er. Ex. 1).

The Regional Director discounted Ms. Rodriguez's testimony because, in his view, it was predicated upon hearsay. However, that finding is erroneous based upon Fed. R. Evid. 801(c). See e.g. Capriccio's Restaurant, Inc., 249 NLRB 685, 685 n.1 (1980)(finding that ALJ erred in finding statement to be hearsay when, in actuality, it was not offered for the truth of the matter asserted but rather to establish its effect on the listener); West Texas Hotels, 324 NLRB 1141, 1141 n. 1 (1997); Alvin J. Bart & Co., 236 NLRB 242, 242 (1978) ("[a]dministrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies"); RJR Communications, 248 NLRB 920, 921 (1980)(noting Board will admit hearsay evidence "if rationally probative in force and if corroborated by something more than the slightest amount of other evidence.").

First, the fact that Ms. Rodriguez overheard statements from other employees that Mr. Johnson was "part of the Union" is not hearsay because they were not offered for the truth of the matter asserted. Rather, the statements were offered for their effect on the listener, in this case Ms. Rodriguez, and how they impacted her belief about whether Mr. Johnson had apparent authority to act as a Union agent. Contrary to the Regional Director's finding, that background is exactly what "precipitated or justified her belief" that Mr. Johnson was a Union representative. (Decision, at 7). And, contrary to what the Regional Director held, Ms. Rodriguez's e-mail memorializes that she observed Mr. Johnson "huddled" with eligible voters, which is exactly the kind of evidence which corroborates the statement the Regional Director improperly found to constitute hearsay. Yet, the Regional Director leapt to conclude that such conduct demonstrated Mr. Johnson was merely "in the receiving area on the day of the election engaged in his normal work activities as a JLL employee." (Decision, at 7). If Mr. Johnson was truly looking for packages, there would be no reason for him to be huddling with eligible voters.

In concluding Mr. Johnson was not a Union agent, the Regional Director instead credited "Union" witness Clifford Gray who testified that the only organizers he ever met were Arturo Achilla and Brian Callow. (Decision, at 8). Of course, Mr. Gray had every incentive to make such a statement given that he was testifying on behalf of the Union which had just won an election by the tally of 8-6. But the Regional Director improperly pitted Ms. Rodriguez and Mr. Gray against one another. What Ms. Rodriguez believed and what Mr. Gray believed could be diametrically opposed from one another, but that does not mean that one is right and the other is wrong. In this case, Ms. Rodriguez's testimony and contemporaneous documentation reflects her reasonable belief that the Union had authorized Mr. Johnson to act on its behalf. Thus, the Regional Director should have found Mr. Johnson acted as the Union's agent predicated upon an apparent authority theory.

The Regional Director did not rely upon any authority suggesting that a shop steward for another employer can never be a union agent, particularly here where the shop steward works at the same site as the eligible voters. As a result, the Regional Director should have concluded Mr. Johnson is a Union agent and applied the Board's teachings that "[a] principal is responsible for its agents' conduct if such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent, even if the principal did not authorize the particular act." Bio-Medical Applications of Puerto Rico, Inc., 269 NLRB 827, 828 (1984). Here, in light of Mr. Johnson's steward status, the Union is responsible for his objectionable conduct.

2. Mr. Johnson Engaged In Objectionable Conduct

In the present case, as noted above, the Regional Director and Hearing Officer ignored Ms. Rodriguez's uncontroverted testimony that she observed Mr. Johnson "huddling" with

at least three eligible voters. That is not, as the Hearing Officer characterized the interaction, a "chance meeting." (Report, at 5). In fact, such a finding completely disregards the context in which this episode took place.

First, the Regional Director and Hearing Officer discounted that this interaction took place while eligible voters were on working time and in a working area. Whereas Board law holds that third-parties can be lawfully excluded from an employer's interior premises, even if such a restriction was applied in this case, it would not have applied to Mr. Johnson given that his employer shared the same site as the eligible voters. To that end, the Regional Director found that the eligible voters were "simply performing their job duties in a location where they customarily performed them and in a manner that is consistent with their past conduct." (Decision, at 11). The Regional Director concluded that there was nothing stopping the eligible voters from moving away from Mr. Johnson if they chose to avoid him. However, that finding ignores the undisputed evidence that Mr. Johnson was huddled with eligible voters. The very definition of a "huddle" is "to gather in a close-packed group." See https://www.merriam-webster.com/dictionary/huddle Certainly, that does not suggest that employees were free to move away from Mr. Johnson, who entered *their* working area.

Second, from a timing perspective, this "huddling" took place less than one hour before the polls opened and less than a half hour before the 9:30 pre-election conference in which Mr. Gray participated and to which Mr. Johnson drove Mr. Gray. (Er. Ex. 1, 2; Tr. 103). Thus, this episode was not a "chance encounter" but rather one by Mr. Johnson's design. Third, the Regional Director and Hearing Officer overemphasized the fact that, at times, Mr. Johnson appears in the Employer's work area to pick up packages. (Decision, at 13). Again, context is key. The Regional Director rejected the Employer's claim that Mr. Johnson's presence in the eligible voters' work

areas was not pretextual. The Regional Director recounted that "Rodriguez testified that Johnson had historically engaged in conversations with multiple individuals while in the receiving area to retrieve packages." (Decision, at 13). That finding is incorrect. Rather, Ms. Rodriguez testified as follows:

> Q: Did Mr. Johnson ever have a business purpose to be in your work area?
> A: Yes.
>
> Q: What would that business purpose be?
> A: To look for any packages.
>
> Q: In those circumstances, how many if any employees would he speak to?
> A: One.

(Tr. 20-21).

Thus, the Regional Director incorrectly ignored that Ms. Rodriguez supplied uncontroverted testimony that if Mr. Johnson was truly picking up a package, he would interact with one of the Employer's employees, not three simultaneously, and certainly would not need to "huddle" with three eligible voters and another unspecified individual to pick up a package. (Tr. 21, 44-46). The clear implication here is that Mr. Johnson was engaged in conduct prohibited by Peerless Plywood.[7]

The Regional Director also agreed with the Hearing Officer's findings that Mr. Johnson did not speak to a "massed assembly" because he only spoke to a few employees. As described above, the actual number of employees Mr. Johnson spoke to is irrelevant. See The Great

[7] The Regional Director and Hearing Officer's reliance upon Business Aviation, Inc., 202 NLRB 1025 (1973) is misplaced because it does not involve a scenario where the Union's agent worked for another on-site employer. The same is true for the Hearing Officer's reliance upon Comcast Cablevision of New Haven, 325 NLRB 833, 838 (1998), which the Regional Director's Decision does not address, which is inapposite because the union's remarks to employees in that case were when the employees were entering and leaving the facility. In this case, the employees Mr. Johnson "huddled" with were on working time and in their working areas.

Atlantic & Pacific Tea Company, discussed supra. Significantly, the Regional Director and Hearing Officer ignored that Mr. Johnson's conduct was sufficiently troublesome to Ms. Rodriguez that she contacted her supervisor to ascertain whether Mr. Johnson should have been in the area in the first place. (Tr. 20-22; Er. Ex. 1).

The Regional Director did not correct that the Hearing Officer also overstressed the fact that neither of the Employer's witnesses heard what Mr. Johnson was saying to the eligible voters during this interaction. As noted above, the actual content of the conversation is irrelevant. See Flurocarbon Co., discussed supra. And, the rationale of Flurocarbon is bolstered by Peerless Plywood's younger cousin, Milchem, 170 NLRB at 362, where the Board established a bright-line rule proscribing conversations with employees waiting to vote "without inquiry into the nature of the conversations." Thus, in light of the fact that Milchem and Peerless Plywood are direct offspring of General Shoe, it is evident that in considering whether objectionable conduct has transpired, the Board is not concerned with the actual content of the discussion, but rather, as is the case here, the uncontroverted fact that the discussion actually took place.

In the present case, the Regional Director improperly credited the Hearing Officer's finding that the content of Mr. Johnson's speech is critical to a finding of objectionable conduct. That finding puts the Employer (and employers generally) in an impossible Catch-22. If the Employer had tried to ascertain the contents of the conversation, it could very well have been accused of unlawful/objectionable surveillance or interrogation. That is especially true in this case where one vote could have changed the outcome of the election. The Board certainly would not sanction such a troublesome obligation which would cause an employer to potentially destroy laboratory conditions to ascertain whether laboratory conditions were infringed upon by the Union.

Therefore, contrary to what the Regional Director found, the Employer is not seeking to conflate Milchem and Peerless. Rather, it is seeking to correct an imbalance between employers' and unions' rights during an organizing campaign in these unique circumstances. A union could seek to ascertain whether an employer engaged in objectionable conduct by asking individuals who listened to a particular speech whether it constituted an "election speech" in contravention of Peerless without the same consequences as an employer. Specifically, an employer could be accused of unlawfully interrogating employees about the subject matter of their protected concerted or union activity in contravention of Section 8(a)(1) of the Act. Notably, in rejecting the Employer's contention that an adverse inference should have been drawn against the Union for not calling Mr. Johnson at the hearing, the Regional Director noted the Employer "failed to call two employee witnesses whom Rodriguez observed near Johnson in the receiving area who would have had first-hand knowledge of what occurred." (Decision, at 16). But, as noted above, to inquire into that conversation would potentially subject the Employer to an interrogation allegation in violation of Section 8(a)(1) of the Act. Such a result is simply untenable.

Finally, in this particular example, it is not as if Mr. Johnson was a third-party who could lawfully be excluded from the premises. As a result, under the unique facts of this case, the teachings of Milchem and Peerless, which are rooted in General Shoe, should be read together to find Mr. Johnson's conduct objectionable. As discussed below, if the subject of Mr. Johnson's conversation during his huddle had nothing to do with the election, the Union could have easily called Mr. Johnson to establish that fact. However, Mr. Johnson did not testify. Therefore, the Regional Director's Decision on this point should be reversed.

C. An Adverse Inference Should Be Drawn Against The Union For Failing To Call Fred Johnson

Even if the content of Mr. Johnson's discussion with eligible voters was relevant, which for the reasons described above the Employer submits it is not, the Regional Director should have reversed the Hearing Officer's failure to draw an adverse inference against the Union for failing to call Mr. Johnson as a witness. As noted above, Mr. Johnson is the Union's agent. The adverse inference rule is predicated upon common sense in that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." Auto Workers v. NLRB, 459 F.2d 1329, 1335-1336 (D.C. Cir. 1972); Metro-West Ambulance Service, Inc., 360 NLRB No. 124 at p. 2-3, n. 13 (2014); SKC Electric, 350 NLRB 857, 872 (2007).

Accordingly, the Board will draw an adverse inference upon a party's decision not to call a witness within its control who has particular knowledge of the pertinent facts concerning a key aspect of an interaction. See Chipotle Services, LLC, 363 NLRB No. 37, p. 1, fn. 1, p. 13 (2015). In fact, in Chipotle Services, the Board affirmed an ALJ's finding that an adverse inference was particularly appropriate when the uncalled witness was one of the party's agents. Id. See also Dump Drivers Local 420, 257 NLRB 1306, 1316 (1981) (adverse inference drawn against union for failing to call business agent to corroborate testimony of other union officer); Battle Creek Health System, 341 NLRB 882, 884 (2004); Metallic Lathers Local 46, 259 NLRB 70, 77 n.19 (1981) (adverse inference drawn against the union where it declined to call a shop steward to testify).

In the present case, because Mr. Johnson is the Union's agent, it could have called him as a witness to testify about the specifics of his discussion with eligible voters. The Union chose not to do so. In fact, given Mr. Gray's evasive testimony (which the Regional Director and

Hearing Officer did not comment upon) concerning the non-controversial issue of whether Mr. Johnson was even a Union steward, an adverse inference that the discussion concerned the election is even more appropriate here. As a result, presuming the content of the discussion is a relevant factor for determining whether Mr. Johnson's (and derivatively, the Union's) conduct destroyed laboratory conditions, based on such an adverse inference, it is justifiable to conclude that Mr. Johnson was speaking about the election when he huddled with the eligible voters. Therefore, he engaged in objectionable conduct attributed to the Union, warranting a second election.

* * *

For the foregoing reasons, the Regional Director should have reversed the Hearing Officer's recommendation and sustained Objection #1. The Regional Director's failure to do so warrants reversal.

VI. FACTS PERTINENT TO OBJECTION NO. 2

The March 29, 2019 election was held at the Rutgers Labor Education Center, located at 50 Labor Center Way in New Brunswick, New Jersey. Karen Brewer, the Employer's Human Resources Business Partner, served as the Employer's representative at the pre-election conference that morning. (Tr. 13, 49-50). Arturo Archila and Brian Callow participated in the pre-election conference for the Union. (Tr. 50-52). During the pre-election conference, the assigned Board Agent covering the election, Anett Rodrigues, directed the participants to vacate the premises and go "[f]ar, far away" by 9:59 a.m. because the polls opened up at 10:00 a.m. (Tr. 52, 54; Er. Ex. 5). Ms. Brewer followed Board Agent Rodrigues' instructions and left the building where the polls were and proceeded to her car parked in Parking Lot 96. (Tr. 54; Er. Ex. 6). Before she left the parking lot, at 9:59 a.m., Ms. Brewer observed Mr. Archila and Mr. Callow standing on the driveway near the entrance to the building. (Tr. 55, 60; Er. Ex. 5).

According to Mr. Callow, he left the building with Mr. Archila and stopped to smoke a cigarette on the driveway and in the parking lot. (Tr. 88). Mr. Callow acknowledged that it could have taken him at least four minutes to smoke the cigarette which would have put him and Mr. Archila in the parking lot after 10:00 a.m. (Tr. 88). Mr. Callow stated he then proceeded to Mr. Archila's car to head to a local Sears store. (Tr. 88). Accordingly, it was possible that eligible voters would have seen Mr. Archila, who was wearing a Union jacket, and Mr. Callow in the parking lot. (Tr. 58, 89). There is only one entrance to the parking lot such that eligible voters would have had to drive through the parking lot where Mr. Archila and Mr. Callow were standing in order to gain access to the Labor Education Center. (Er. Ex. 6).

VII. THE REGIONAL DIRECTOR AND HEARING OFFICER'S FINDINGS CONCERNING OBJECTION # 2

Relying upon Milchem, 170 NLRB at 362, the Hearing Officer recommended overruling the objection on the grounds there was no evidence of any electioneering in the polling area. (Report, at 7). He also found there was no evidence Mr. Archila or Mr. Callow were still in the parking lot after the polls opened. (Report, at 7).

The Regional Director affirmed the Hearing Officer's findings, concluding, without substantive analysis that the Hearing Officer relied on other cases in overruling Objection No. 2. The Regional Director also concluded the Hearing Officer lacked authority to consider the Employer's contention that Messrs. Arturo and Callow disregarded the Board agent's instructions at the pre-election conference to go "far, far away" because they were not contained in the Employer's initial objections. (Decision, at 19-20). Finally, the Regional Director concluded that even a disregard of the Board Agent's comment to go "far, far away" would not violate Milchem in which the Board explained that "the law does not concern itself with trifles." (Decision, at 20).

VIII. ARGUMENT – OBJECTION #2 SHOULD HAVE BEEN SUSTAINED

As a threshold matter, the Regional Director incorrectly found the Hearing Officer somehow lacked authority to consider the Union agents' failure to adhere to the Board Agent's directive to go "far, far away." The Regional Director relied upon two cases for this point, neither of which are applicable. In Precision Products Group, Inc., 319 NLRB 640 (1995), the Board found the Hearing Officer exceeded his authority when he considered an objection which the union had, in fact, withdrawn. In Iowa Lamb Corp., 275 NLRB 185 (1985), the Board held a hearing officer improperly considered "an issue that was not fully litigated and was wholly unrelated to the issues set for hearing."

Significantly, the Regional Director did not cite American Safety Equipment Corporation, 234 NLRB 501 (1978), cited by Precision Products, where the Board noted longstanding authority that "the Regional Director is not required to, nor can he properly, ignore evidence relevant to the conduct of the election … simply because [a litigant] may not have specifically mentioned such conduct in its objections." (citations omitted). In that case, the Board recognized that if a Regional Director "receives or discovers evidence during his investigation that shows that the election has been tainted, he has no discretion to ignore such evidence and it is reversible error if he fails to set aside the election." Id. (citations omitted).

Here, the issue of the Union agents' failure to follow the Board Agent's instructions is governed by American Safety Equipment Corporation, not Precision Products or Iowa Lamb. The Employer never withdrew any objection concerning this conduct and the issue was fully litigated at the hearing (with extensive testimony from Mr. Callow and Ms. Brewer on the matter).

Thus, the Regional Director improperly failed to find the Hearing Officer incorrectly limited his analysis to Milchem, 170 NLRB at 362, but did not consider other possible alternative grounds for objectionable conduct, including the Union's failure to adhere to a Board

agent's instructions and improper surveillance. As a threshold matter, the Hearing Officer did not consider Messrs. Arturo and Callow's disregard of the Board Agent's directive that the participants in the pre-election conference go "far, far away." (Tr. 52, 54; Er. Ex. 5). Rather, Mr. Callow lit a cigarette after exiting the Labor Education Center and acknowledged that he could have been in the parking lot after the polls opened. (Tr. 88).

In Electric Hose Co., 262 NLRB 186, 216 (1982), the Board affirmed an ALJ's decision finding that an employer engaged in objectionable conduct when a supervisor stationed himself near the polling area without any justification. The ALJ found "it can only be concluded that his purpose in observing the event was to effectively survey the union activities of the employees and to convey to these employees the impression that they were being watched." Id. As a result, the ALJ found such conduct to destroy laboratory conditions. The Regional Director found Electric Hose Co. to be distinguishable because it did not involve a scenario where a supervisor disregarded a Board agent's instructions. However, that finding misapprehends the Employer's contention. Electric Hose stands for the proposition that a party's agent cannot loaf around the voting area without destroying laboratory conditions. Here, the evidence demonstrates the Union agents failed to promptly leave the voting area, thereby destroying laboratory conditions.

This authority applies with equal force to the present case. There was no justification for the Union representatives' failure to adhere to the Board Agent's instructions. In fact, Ms. Brewer was fully able to comply. (Tr. 54, Er. Ex. 5). Contrary to the Hearing Officer's findings, which the Regional Director did not correct, the representatives' presence outside the Labor Education Center, in comparison to being inside the building, is of no moment because of the special circumstances surrounding this particular election. Specifically, this election was held at a neutral location, a car-ride away from the voters' work site. (Tr. 13, 49-50). Accordingly,

based upon the physical layout, any eligible voter would have been required to pass the Union representatives in order to cast a vote which destroys the laboratory conditions. As a result, a new election is warranted.

For the foregoing reasons, the Regional Director improperly failed to overrule the Hearing Officer's recommendation concerning Objection #2. Therefore, the Employer's Request for Review should be granted.

IX. CONCLUSION

For the foregoing reasons, the Regional Director's Decision affirming the Hearing Officer's recommendations concerning the Employer's Objections should be reversed and a new election be directed in light of the Union's objectionable conduct.

Respectfully submitted,

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/s Daniel Schudroff
Daniel D. Schudroff

ATTORNEYS FOR EXELA ENTERPRISE SOLUTIONS, INC.

Dated: September 10, 2020

CERTIFICATE OF SERVICE

Case Name: Exela Enterprise Solutions, Inc.
Case No.: 22-RC-237040

I hereby certify that, on September 10, 2020, I caused a true and correct copy of the **REQUEST FOR REVIEW** in connection with Case Number 22-RC-237040 to be served upon counsel of record for United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied & Industrial Service Workers International Union, AFL-CIO-CLC, Brad Manzolillo, via e-mail at bmanzolillo@usw.org and upon the Regional Director for Region 22 of the National Labor Relations Board, David Leach III, via e-mail at david.leach@nlrb.gov.

/s Daniel Schudroff
Daniel D. Schudroff

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